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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

UNITED STATES OF AMERICA,

—vs.—

JOHN JAMES BRENNAN, PATRICK DELLO RUSSO, JOHN FUSCO and SOLOMON KIMMEL,
Petitioners-Appellants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Statement of the Case

This is a joint petition by John James Brennan, Patrick Dello Russo, John Fusco and Solomon Kimmel from judgments of conviction entered in the United States District Court for the Southern District of New York on November 9, 1967 after a trial by the Court, sitting without a jury, before the Honorable Edward Weinfeld, United States District Judge. The trial began on October 9, 1967 and continued on October 10, 11 and 12 when the Court returned a verdict of guilty as to all defendants on all counts. The indictment, filed on March 23, 1966, charged these appellants along with Robert Jackson, a co-defendant whose case was severed prior to this trial, in five counts. The first count charged a conspiracy among all the defendants

to violate Title 18, Section 1952 of the United States Code by traveling in interstate commerce with the intent "to distribute the proceeds of and to otherwise promote, manage, establish, carry and facilitate" an unlawful activity in the form of a dice game, in violation of the laws of the State of New York, and thereafter to distribute said proceeds and perform other acts to promote, etc. said unlawful activity. Counts two through five alleged substantive violations, in language similar to that in the First Count, on four separate dates (5a-8a). The appellants were all sentenced, on November 9, 1967, to a term of six months on Count 1 and six months on Counts 2, 3, 4 and 5; the sentences on Counts 2, 3, 4 and 5 to run concurrent with each other and consecutive to the sentence on Count 1. The execution of sentence on Counts 2, 3, 4 and 5 was suspended and defendants were placed on probation for two years upon expiration of the prison sentence on Count 1 (177a-188a).

At the conclusion of the Government's case defense counsel moved for a judgment of acquittal on the grounds that: (1) the proofs did not establish the essential elements of the crime as charged in the indictment; (2) the proofs were at fatal variance with the indictment; (3) the dice game was not shown to be a business activity rather than just a casual, sporadic game; (4) it violated fundamental fairness to permit an activity which was, if proved, only a misdemeanor under state law to be upgraded into a felony under federal law merely because the activity occurred during the course of an interstate trip; and (5) the proofs did not establish a violation of a state law (157a-169a). The Court denied these motions (170a). The Court of Appeals affirmed the judgments of the District Court (Exhibit A, *infra*).

Statement of Questions Involved

1. In a prosecution under 18 U.S.C. Section 1952, where the proofs fail to establish the performance or attempted performance of any acts subsequent to the interstate travel should not a judgment of acquittal be granted?

2. In such a prosecution, where the proofs fail to establish that the dice game was a business enterprise should not a judgment of acquittal be granted?

3. Where the proofs fail to establish that the dice game was in violation of any New York law concerning gambling should not a judgment of acquittal be granted?

4. Is it not a violation of due process of law for a federal crime which is based upon a violation of a state law to be a felony where the state law is only a misdemeanor?

Jurisdiction

The judgment of the Court of Appeals, Second Circuit (Appendix A hereto, *infra*) was made and entered on May 8, 1968. Mr. Justice Harlan granted the appellants an extension of time for the filing of the instant petition to and including July 7, 1968 (Appendix B hereto, *infra*). The jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. Section 1254(1).

Statement of Facts

Eugene Hindes, an F.B.I. agent, testified that he was on board the ship called the S.S. City of Keansburg four times during July and August of 1965 (13a). On July 28 he boarded the ship at 6:45 p.m. at Atlantic Highlands, New Jersey. He saw the Defendants Dello Russo and Brennan at the bar on the first deck (14a) and then fol-

lowed them to the second deck where he saw them together with the Defendants Fusco and Kimmel (15a). The four men then began a dice game with another individual at two tables which had been set up on the aft portion of the second deck (16a-17a). The defendants took certain positions around the table (18a). Agent Hindes watched the game periodically from 7:30 to 8:25 and observed all the defendants in the same positions (19a). There were about 10 to 15 people in the game and there was money on the table. The game broke up at about 8:20 as the boat approached the 69th Street pier in Brooklyn (20a). On July 31, 1965 Hindes boarded the boat at 7:05 at Atlantic Highlands. At about 7:30 he saw the defendants in a dice game, again in the same place and in the same positions around the table. He watched for about two hours (21a). Fusco would shoot dice with other players while Dello Russo, Brennan and Kimmel would return the dice to the shooter. He saw Fusco get into arguments about money with other players and observed that the other three defendants would side with him in these arguments (22a-24a). On August 5 he went to Monmouth Park Race Track in New Jersey and did not see any of the defendants (25a-27a). After the last race he took a bus to the pier at Atlantic Highlands and did not see the defendants on the bus. At 8:00 p.m. he saw Dello Russo and Brennan at the dice game again and arrested Brennan (28a). At that time Brennan attempted to reach into his pocket and the agent removed three dice from his pocket (29a-31a). On cross-examination the agent stated that he had been on the ship on August 4 but had not seen any of the defendants. He estimated that the July 28 game lasted about one hour five minutes and the July 31 game about two hours (32a-33a).

Robert A. Jackson, a co-defendant, testified that he had worked on the S.S. City of Keansburg for 25-30 years. He was a bosun's mate in 1965 (34a-35a). In July 1965 he met Fusco on board the ship (39a) and he asked him to set

up a table. He set up the table and Fusco gave him four dollars as he departed the boat that day (39a-40a). He testified that he set up the table an average of four to five days a week from mid-July until August 5 (42a). When the boat reached Atlantic Highlands there would be a lay over and Jackson would spend the time at Paul's Tavern. Either Fusco, Dello Russo, Brennan or someone else unknown to him would approach him and ask him to set up the tables (44a-45a). He saw these defendants sitting together in the tavern (46a). They would board the ship singly (47a). He always saw Fusco, Dello Russo and Brennan participating in the dice game but never saw Kimmel doing so (49a-50a). He was paid on about five occasions by Fusco, Brennan, Dello Russo and Kimmel. He received five or ten dollars each time (51a-52a). People in the game could bet with anyone and did not have to bet with the defendants (56a-57a).

Martin R. Grealy, an F.B.I. agent, testified that he was on board the ship on August 2 at 7:10 p.m. He saw Fusco, Dello Russo and Kimmel gather around the dice table (58a-60a). Fusco began to throw the dice and shortly thereafter Brennan and another man joined the group at the table (60a). Agent Grealy watched the game until 8:30. Other men joined the game until there were about 25 participants (62a-63a). Brennan, Dello Russo and Kimmel stayed at one end of the table where only they could return the dice to the shooters (63a). An unknown man entered the game and won quite a bit of money (64a). He followed this man to the bar and Fusco appeared there five minutes later (65a). After a conversation the man gave Fusco some money (65a-66a). Agent Grealy returned to the game and saw another man win a lot of money. This man left the boat with Brennan (67a). He also saw Dello Russo and Fusco conversing in the bar (67a). On August 5 Grealy was at Monmouth Race Track and did not see the defendants there or on the bus to the pier (68a-69a). He saw them all, on the ship, start a dice game at around

7:10 p.m. He watched until 8:05 when they were arrested. On cross-examination Grealy stated that Brennan was not present when the game began on August 2 (73a). The person rolling the dice chose from 3 or 4 sets of dice (74a). On August 2 Brennan bet both for and against the persons rolling the dice, as he did on August 5 (75a-76a). Grealy was unable to say whether Fusco won or lost money on August 2 (77a) and on August 5 he was not even certain if Fusco played (78a). On that day Fusco bet both for and against the rollers (78a). He conceded that there was no banker in the dice game he watched on August 2 (80a). He did not see Kimmel shoot dice on August 5 (83a). On redirect, Grealy recalled that he had seen the unknown second big winner conversing with Fusco, Brennan and Kimmel in the bar area.

Robert Tolan, an F.B.I. agent, saw Dello Russo on August 2 at the Port Authority Terminal in New York. At 3 p.m. he saw him board a bus for Long Branch and Keansburg. On August 3 at 5:30 p.m. he saw Fusco and Dello Russo get off the same bus in Atlantic Highlands, New Jersey (84a-84a-2).

James F. Mitchell, an F.B.I. agent, was at Battery Park in New York on August 2 when the ship docked. He saw Dello Russo and three other men get into a taxi and proceed to the Dixon Cafeteria (84a-4 to 84a-5). Inside the cafeteria he saw Dello Russo and Fusco sitting at a table with some others. Brennan and his son were at a table just to the right of the other (84a-6). At another nearby table were Kimmel and some other men (84a-7). He then saw an exchange of money among the defendants (84a-8). On August 5 Mitchell saw Dello Russo and Fusco board a bus at Port Authority at 3:40 p.m. for Keansburg (84a-9).

Arthur Behm, an F.B.I. agent, was on board the ship on July 31 at 7:15 p.m. (85a-86a). At 7:45 he saw a dice game in progress. All of the defendants were participating

in the game (86a). He watched from 7:45 to 9:10 p.m. when the ship docked at the 69th Street pier in New York (67a). There were 15-20 men participating in the game. Fusco was a shooter and the other defendants acted as catchers of the dice (88a). Except on one occasion, all of the defendants bet with Fusco when he rolled (89a). Kimmel returned the dice palms down (90a). Dello Russo was seen to have an extra dice in his hand on two occasions when he returned the dice (93a-96a). At one point he heard Dello Russo ask Brennan, "Do you have them on you," to which Brennan replied, "Yes, in my pocket" (96a). Agent Behm edged in between Dello Russo and Brennan and felt a lump or lumps in Brennan's pocket (97a). A stranger rolled eleven straight passes with the dice and when Brennan remarked about his luck, Dello Russo was heard to say, "Yeah, we will get to him later" (97a-98a). All of the defendants left the ship with this unknown winner (99a). On August 5 Behm was at Monmouth Park Race Track and did not see the defendants there or on the bus to the ship (100a). He saw Brennan and Dello Russo coming on the ship but not from the buses (101a). At 8:05 the agent arrested Kimmel (101a). Kimmel stated that he had never shot dice on a ship before and that he did not know the other defendants (103a). Later, at the F.B.I. office, Kimmel said he had played once or twice before but only on the deck of the ship and not on the tables. He still said he did not know the other defendants (104a). On cross-examination, Behm stated that on August 5 he always observed Brennan to return the dice palms up (105a). He also admitted that dice players roll both with palms up and palms down (106a-107a). The dice taken from the table at the time of the arrest were honest dice (108a-109a). On July 23 Behm was on board the ship but there was no game (111a). On August 4 Kimmel was not on board the ship (111a).

Robert W. Kennedy, another F.B.I. agent, was at Monmouth Park on August 5 but did not see the defendants

there or on the bus (112a-113a). On that day he arrested Dello Russo on the ship and searched him (144a). In his pockets the agent found six dice (115a). The dice only had 5, 3 & 1 on them and thus were not ordinary dice (116a-117a). Dello Russo stated to the agent, "Put the dice away, don't let anybody see them" (118a). He denied operating a dice game and said he was merely playing dice (119a). Dello Russo said he had been caught using phony dice before and had been beat up (120a). He said that he had better find another trade now that the F.B.I. was involved in these investigations (121a-122a). He also denied any knowledge about the operation of a dice game on the ship (123a). Brennan asked Agent Kennedy if he could walk behind him so that "the suckers couldn't see his face" (123a).

Agent Harris Miller also did not see the defendants at the track or on the bus on August 5 (125a). He arrested Fusco (126a). In his pocket was a card for a company that sold dice equipment (129a). Fusco stated that he didn't know anyone else in the dice game and was just a player (131a). He said he had not been down on the ship for some time (132a-133a).

Agent Walter Taylor was on the ship on July 28. At 7:20 p.m. he saw a dice game in progress with the defendants participating (135a). At 8:45 he saw Dello Russo go into the bar and join Brennan and Kimmel in a booth. Fusco was standing at the bar nearby (137a-138a). On August 5 he arrested Brennan and found four irregular dice in his pocket (139a-140a). In Brennan's wallet he found a car registration in the name of Dello Russo (144a).

Agent T. Vernon Hoggard was on board the ship on July 26 and spoke to Dello Russo. There was no dice game on that date (145a-147a). On July 28 at 7:20 he saw the defendants begin a dice game (148a). Brennan, Kimmel and Dello Russo returned the dice to the shooters (150a).

At about 8:15 the game ended and he saw the defendants in the bar. Dello Russo was counting money and money was distributed (152a). On August 5 he saw Dello Russo and Brennan get on the ship together (154a).

Counsel moved for a judgment of acquittal at the end of the Government's case (155a-156a) and at the end of the entire case (157a) which were denied. The Court found the defendants guilty on all counts (170a-176a).

ARGUMENT

POINT I

The government failed to prove a violation of the statute since there was no showing that any criminal acts were performed subsequent to the interstate travel.

The statute under which the instant indictment was drawn reads as follows, in pertinent part,

> "(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to——
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be . . .

> (b) As used in this section "Unlawful activity" means (1) any business enterprise involving gambling . . . offenses in violation of the laws of the State in which they are committed . . . ." 18 U.S.C. Section 1952.

In the within Indictment the defendants were charged with traveling in interstate commerce with the intent to perform the acts specified in subsections a(1) and a(3) above and thereafter performing those acts specified. The Indictment did not charge the defendants with that portion of the statute which refers to using "any facility in interstate" commerce.

No reported case appears to have dealt with a situation at all similar to that presented in this case. Here we are confronted with an alleged unlawful activity which takes place during the interstate travel. A reading of the statute seems to make clear that two basic elements are required; (1) travel in interstate commerce with the intent to perform certain acts, and (2) *thereafter* the performance or attempted performance of one of the designated acts. It has been noted that the law as originally drafted did not include the "thereafter" portion but it was amended to make clear the congressional intent that there be the performance (or attempted performance) of such an act after the interstate travel has taken place. *United States* v. *Zizzo,* 338 F.2d 577 (7th Cir. 1964). In *United States* v. *Ryan,* 213 F. Supp. 763, 764 (D.C. Colo. 1963), the Court said that the unlawful activity must take place after the interstate travel. A review of cases decided under this section indicates that one and all have involved interstate travel followed by the performance of the unlawful activity in the state to which the defendant had traveled. It is respectfully submitted that the statute was not intended, either in letter or in spirit, to cover the activities proven in this case.

In this case the travel was wholly incidental to the alleged unlawful activity. The defendants could not have traveled with the intent to distribute the proceeds of the dice game since there were no proceeds until the travel had already taken place. Indeed it could never be known whether or not there would be any proceeds since there was no proof at all that anyone ever lost any money playing in this dice game. For all the Government's proofs would show, Defendant Fusco, who shot dice, may well have lost money rather than won it. Aside from the intent to distribute the proceeds, it was also incumbent upon the Government to prove that such proceeds were thereafter distributed. With respect to two of the dates, involved in substantive counts 3 and 5 the record is absolutely barren of any proof of distribution. On two dates, July 28 and August 2, the Government showed the defendants being together and money being passed around. There was no proof, however, to show that this money was the proceeds of the dice game. As noted above, there was no showing that the game had any proceeds on the dates indicated.

Aside from distribution of the proceeds, the Government charged the defendants, alternatively, with traveling with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of the dice game and thereafter with performing acts to promote, etc. Once again the basic problem is the fact that any acts performed by the defendants were performed during the course of the interstate travel and not *thereafter* as required by the statute. As urged above, the apparently clear purpose of the statute was to penalize those persons who traveled from one state to another with the intention of engaging in an unlawful activity and who, after arriving at their destination, do so engage in the criminal enterprise.

As noted previously, the Indictment did not seek to charge the defendants under that portion of the statute which says, "or uses any facility in interstate" commerce. During counsel's summation the Court made a tentative

reference to this phrase (162a) but apparently abandoned that approach when counsel pointed out the variance which this would produce between the Indictment and the proofs (163a-165a). The Court made no further reference to it in its opinion nor did it make any factual findings in this regard (170a-176a). It is, of course, well established that, even if this clause were applicable, such a material variance between the Indictment and the proofs would be fatal. *Stirone* v. *United States,* 361 U.S. 212 (1960). Even if this were not so, it is evident that this conviction could not be sustained under that portion of the statute in light of the argument outlined above. Here, the use of the facility in interstate commerce was not followed by any of the designated criminal acts. The use of the facility was itself intertwined with the dice game. It was not used, for example, to travel from New Jersey to New York with the intention of engaging in a dice game in that state, the type of situation which the statute apparently seeks to cover.

It is fundamental that penal statutes are to be strictly construed. In *United States* v. *Shapiro,* 113 F.2d 891, 893 (2d Cir. 1940), this court quoted with approval from *United States* v. *Weitzel,* 246 U.S. 533, 543, as follows:

> "Statutes creating and defining crimes are not to be extended by intendment because the court thinks the legislature should have made them more comprehensive."

So in this case, the statute in question should not be extended to cover activity not fairly within its terms. Such an interpretation would not leave the authorities powerless to deal with such dice games since the States are still free to exercise their jurisdiction in this area. See *State* v. *Carlaftes,* 24 N.J. 451, 132 A.2d 505 (Sup. Ct. 1957). This federal statute, however, does not encompass the activities proven by the Government in this case. Therefore, the motion for judgment of acquittal should have been granted.

POINT II

The proofs failed to establish that the dice game was a business enterprise as contemplated by the statute.

The statute defines the unlawful activity at which it aims to be "any business enterprise involving gambling" offenses. This phrase was construed, in the oft-quoted decision of *United States* v. *Teemer,* 214 F. Supp. 952, 958 (D.C. W. Va. 1963), as requiring an "entrenched operation rather than a sporadic poker game or a floating crap game." The court there noted that the enterprise must be a continuing one. The government's proofs in this case failed to establish that the dice game observed aboard the S.S. City of Keansburg was such a business enterprise, for the reasons to be discussed below.

First, the games, both individually and together, were of a short duration and were not regularly scheduled. The testimony was that the games observed by the F.B.I. lasted between one and two hours. The games were not played every day that the ship was operating and were only played at all from mid July to August 5. The games were not on fixed days since the days on which there were no games varied over the weeks.

Second, there were no employees connected with this game and no fixed premises for the game such as were described in *United States* v. *Barrow,* 212 F. Supp. 837, (E.D. Pa. 1962), and no particular equipment was used in the game.

Third, there was no proof that the defendants made any money in this game. The game did not have a "banker" or a "house" with whom all bets had to be made. Rather, bets were made both for and against the person rolling the dice, even when the Defendant Fusco was the player. In addition, there were side bets made among the various non-rollers. Not a single person was shown to have lost money in this game. Indeed, on at least one occasion an individual

wholly unconnected with the defendants was shown to be a big winner, so big in fact that he closed out the game. While the government attempted to raise an inference that the game was conducted dishonestly the proof in this regard was wholly speculative. While irregular dice were found on two of the defendants, no such dice were shown to have been introduced into the game. The roller, in fact, chose from 6 to 8 dice on the table. Testimony that certain defendants returned the dice "palms down" was countered by testimony that others returned it "palms up" and that, in any event, either way was normal. Thus, the profit motive, the very essence of a business enterprise, was absent from this case.

Fourth, no particular customers were sought for this game and there was absolutely no solicitation. The game merely attracted whoever was on the boat and was inclined to play.

Fifth, the game was conducted completely in the open, was not secretive or furtive as would be expected of a racketeering enterprise.

Considering all of these various factors it becomes clear that the Government failed in an essential element of its proof in this case. This dice game was not of such a continuous and organized nature as to constitute a business enterprise.

POINT III

The government failed to prove that the dice game was an unlawful activity under New York law.

In order to prove its case the Government undertook, as it had to do, to establish that this dice game was in violation of the laws of the State of New York. The Court found that the game was in violation of Section 970 of the New York Penal Law and of Section 971(4), (170a-171a).

Section 970 provides, in pertinent part, as follows:

> "A person who is the owner, agent or superintendent of a place or of any devise, or apparatus, for gambling; or who hires, or allows to be used a room, table, establishment or apparatus for such a purpose; or who engages as a dealer, gamekeeper or player in any gambling or banking game, where money or property is dependent upon the result . . . is a common gambler, and guilty of a misdemeanor."

Section 971 reads, in pertinent part, as follows:

> "It is unlawful to keep or use any table, cards, dice or any other article or apparatus whatever, commonly used or intended to be used in playing any game of cards, or faro, or other game of chance upon which money is usually wagered, at any of the following places:
>
> * * * * *
>
> 4. Within any vessel lying in, or navigating, any of the waters of this state; or owned, or navigated by, or for account of any corporation created by the laws of this state.
>
> A person who knowingly violates this section is guilty of a misdemeanor."

With respect to any violation of Section 970 it is clear that this law is meant to prohibit only that gambling which has a professional or commercial aspect. Indicative of this type of venture is the fact that the defendant receives a percentage of the money bet, has some advantage over other players, engages in gambling for his living or gambles habitually and frequently. *People* v. *Marconi*, 27 Misc. 2d 348, 217 N.Y.S. 2d 232 (City Ct. 1961). It has been noted that "the underlying idea is the habitual participation in gaming as a money-making pursuit." *People* v. *Williams*, 45 N.Y.S. 2d 641, 642 (Cty. Ct. 1943). Even participation in a series of games is not sufficient unless the professional

or commercial aspect is present. *People* v. *Bright*, 203 N.Y. 73, 96 N.E. 362 (Ct. of Appeals, 1911).

In this case, as noted earlier, there was no proof that any defendant had an advantage over other players nor that any defendant received a percentage of the money bet. The proof indicated no more than participation in a series of dice games. This was, it is submitted, insufficient to constitute a violation of Section 970. With respect to Section 971(4) the statute would appear to penalize the mere possession of dice upon a ship in New York waters. Such a reading sweeps too far. It would drag in its net even the most innocent person who might, for example, carry a die as a good luck charm. If the statute has any meaning it would appear to penalize the possession of dice in the designated place with the intent to use them, in the place, in a game of chance. Here none of the defendants was shown to possess any dice which were in fact used in the dice game on the City of Keansburg. Thus, there was no proof that 971(4) was violated. Absent a showing that the defendants were engaged in a gambling offense in violation of New York State Law the conviction must fall.

POINT IV

Converting a misdemeanor under New York law into a federal felony under the circumstances of this case constitutes such a violation of fundamental fairness as to violate due process of law.

The net effect of the prosecution in this case is to transform a misdemeanor under New York law into a federal felony by virtue of the fact that a game of dice is played upon a ship going from New Jersey to New York rather than played in New York itself. This process, by which a state offense punishable by one year in prison is converted and magnified into a felony punishable by up to five years in jail together with the numerous other disadvantages

which follow upon a felony conviction, is so fundamentally unfair that it violates due process of law. It does not appear that this particular proposition has ever been raised in any of the cases upholding the constitutionality of 18 U.S.C. 1952. See, e.g., *United States* v. *Zizzo, supra; United States* v. *Teemer, supra; United States* v. *Borgese,* 235 F. Supp. 286 (S.D.N.Y. 1964).

It is submitted that the application of this statute to the dice game in this case violates that "fundamental fairness essential to the very concept of justice," *Lisenba* v. *California,* 314 U.S. 219, 236 (1941), which is the essence of due process of law. While Section 1952 might well be, and has been, applied to substantial interstate criminal activity it is also clear that a statute which is plain and unambiguous on its face may be given an application that violates due process of law. *United States* v. *Spector,* 343 U.S. 169 (1952). Stated differently, "a statute may be invalid as applied to one state of facts and yet valid as applied to another." *Dahnke-Walker Co.* v. *Bondurant,* 257 U.S. 282, 289 (1921). Assuming that this statute can be read to cover the activity of the defendants herein (a point which appellants do not concede, see Point I, supra), it is urged that the application of the statute in this situation creates a "mountain out of a mole hill." If the defendants had engaged in the very same dice game in New York City they might be subject to the misdemeanor penalty arising out of Sections 970 or 971 of the New York Penal Law. By the fact that the game took place on a ship traversing New York Bay the misdemeanor became a felony. As a result, the defendants were subjected to greater punishment than they could have received under the New York law whose violation was the very foundation of the federal crime. The defendants received six month terms and two years probation. In addition, the very conviction of a felony renders the defendants subject to collateral penalties and disadvantages. Can it be said that any valid federal purpose is furthered by the application of the statute to

this set of facts? Rather the wholly insignificant fact that the situs of the dice game was a ship plying between New Jersey and New York has been seized upon to upgrade and magnify a relatively minor state crime into a major federal prosecution. Where, as here, the federal crime is bottomed upon a violation of a state law it is manifestly unfair to permit the federal crime to be of a more serious nature than the state, particularly when the added jurisdictional factor is so unimportant. This is essentially the same type of reasoning which prevents, under federal law, the punishment for a conspiracy from exceeding that for a misdemeanor when the underlying offense is only a misdemeanor. 18 U.S.C. 371; see, Moscowitz, *Trial of a Criminal Case in the Federal Court,* 3 F.R.D. 380, 392.

It is submitted that this approach comports with fundamental fairness and should be adopted to declare this conviction invalid.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

THEODORE ROSENBERG,
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Tel. 212-858-0589

APPENDIX

Exhibit A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 388—September Term, 1967.

(Argued April 4, 1968 Decided May 8, 1968.)

Docket No. 31950

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOHN JAMES BRENNAN, PATRICK DELLO RUSSO, JOHN FUSCO and SOLOMON KIMMEL,

Appellants.

Before: MOORE, WOODBURY * and SMITH,

Circuit Judges.

Appeal from a judgment of conviction entered in the District Court for the Southern District of New York, Weinfeld, *J.*

Affirmed.

JAMES W. BRANNIGAN, JR., New York, N. Y. (Robert M. Morgenthau, United States Attorney for the Southern District of New York, Robert G. Morvillo, Assistant United States Attorney, of counsel), *for appellee.*

* Of the First Circuit, sitting by designation.

DANIEL G. ISLES, Orange, N. J. (Querques, Isles & Weissbard, Orange, N. J., Michael A. Querques, Orange, N. J., and Harvey Weissbard, Orange, N. J., on the brief), *for appellants.*

PER CURIAM:

This is a case of a real floating crap game. Four or five times a week, from July 15, 1965, to August 5, 1965, appellants sponsored a dice game on the SS City of Keansburg as the vessel navigated from Atlantic Highlands, New Jersey, to Brooklyn, New York, to Manhattan, New York. Many of the passengers were returning from the horse races at Monmouth Park, New Jersey; presumably they were either reckless with their winnings or eager to recoup their losses. Usually, ten or twenty-five of these passengers joined in appellants' game at one time. The game lasted for the entire trip and on some occasions there was an exchange of money among appellants on arrival in New York.

The game followed a consistent pattern. Appellants rented a table from co-defendant Robert Jackson. Brennan, Dello Russo, and Kimmel stationed themselves near the end of the table which had been placed against the bulkhead. They returned the dice to the shooters. Fusco played in the game and kept it going. When Brennan and Dello Russo were arrested, the police found irregular dice in their pockets.

The district judge found appellants guilty of violating Title 18 U.S.C. § 1952, quoted in material part in the margin,[1] and of conspiracy to commit that offense, Title 18

[1] "Title 18 U.S.C. § 1952. INTERSTATE AND FOREIGN TRAVEL OR TRANSPORTATION IN AID OF RACKETEERING ENTERPRISES

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

U.S.C. § 371. He found that they had carried on the unlawful activity of common gambling, New York Penal Law § 970, and of using a table and dice in a game of chance in a vessel on New York waters, New York Penal Law § 971(4).

Appellants contend that the "thereafter" in Title 18 U.S.C. § 1952 requires that the illegal activity must occur after interstate travel has taken place. Since appellants gambled during the trip, it is argued that they did not violate the statute. The "thereafter" does not mean, however, that the illegal activity must happen after interstate travel has ceased. Here, appellants gambled after the vessel had crossed a state line. This is sufficient to support the conviction.

Appellants also argue that the game was not a "business enterprise"; they contend that it was not an ". . . entrenched operation rather than a sporadic poker game or a floating crap game." *United States* v. *Teemer*, 214 F. Supp. 952, 958 (D.C. W. Vir. 1963). However, this floating crap game was an entrenched operation. Its regularity, location, size, operation, participants, and the exchange of money support this finding. As to state law, the evidence indicates that appellants gambled "habitually and frequently," *People*

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(1) distribute the proceeds of any unlawful activity or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years or both.

(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, ..."

v. *Marconi*, 217 N.Y.S. 2d 232, 233 (City Ct. 1961), and as a "moneymaking pursuit," *People* v. *Formato*, 143 N.Y.S. 2d 205, 208 (App. Div. 1955), aff'd, 309 N.Y. 979 (1956).

Finally, appellants contend that converting a misdemeanor under New York law into a federal felony violates due process. This is without merit.

Affirmed.

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No. 255

In the Supreme Court of the United States

OCTOBER TERM, 1968

JOHN JAMES BRENNAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,
FRED M. VINSON, Jr.,
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 394 F. 2d 151.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1968. On May 22, 1968, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to July 7, 1968, and on July 1, 1968, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

815-044—68

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1952, a statute designed to prohibit interstate travel in aid of gambling, covers petitioners' conduct aboard a vessel engaged in interstate commerce.

2. Whether the trial judge erred in finding that the gambling by petitioners aboard a ship was a business enterprise.

3. Whether petitioners' prosecution for the federal felony of interstate travel in aid of gambling was impermissible because a state prosecution for the gambling would have been for a misdemeanor.

STATUTE INVOLVED

18 U.S.C. 1952 provides in pertinent part:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> (1) distribute the proceeds of any unlawful activity; or
>
> * * * * *
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling * * * in violation of the laws

of the State in which they are committed or of the United States.

* * * * *

STATEMENT

After a non-jury trial in the United States District Court for the Southern District of New York, petitioners were convicted on a five-count indictment which charged conspiracy and four substantive counts of travelling in interstate commerce in aid of gambling (18 U.S.C. 1952). On November 9, 1967, each was sentenced to six months' imprisonment on the conspiracy count, and to concurrent six months' imprisonment for each of the substantive offenses, with the sentence on the substantive counts (Counts 2 through 5) suspended for two years. The court of appeals affirmed.

The "City of Keansburg" was an excursion ship (R. 131) that operated between Atlantic Highland, New Jersey, and New York, New York. In July and August 1965, for a three-week period, many of its passengers to New York City on the evening run were persons returning from a New Jersey racetrack. Tables in a lounge area of the ship were used by petitioners for dice games which occurred aboard the ship four or five times per week during this period (R. 137). After the ship docked in New York petitioners would pay a crewman for setting up the tables (R. 135, 147, 720).

F.B.I. agents observed the games on four occasions. The games would be started by three of the petitioners positioning themselves around the table near the wall that the rolled dice were required to strike. They were

the only ones who could return the dice to the player (R. 57, 60, 64, 248, 389). The fourth petitioner, Fusco, then would initiate the game (R. 275, 276) and other passengers would join in (R. 55, 276). F.B.I. agents observed that all petitioners bet and, except when the game commenced, always bet that Fusco would win (R. 393).

Once an unidentified player, apparently a big winner, was seen giving a large amount of money to Fusco (R. 257). On other occasions the petitioners were seen dividing up money either aboard ship or afterwards in New York City (R. 582, 343).

The F.B.I. observed activities suggesting the "palming" of dice (R. 394–395, 422, 465). All petitioners were arrested while the August 5 game was in progress. Dello Russo and Brennan were found to have irregular dice in their possession (R. 479, 550).

ARGUMENT

1. Petitioners argue that their conduct is not covered by 18 U.S.C. 1952 because the gambling took place during the interstate travel and not after the conclusion of the trip (Pet. 10–12). However, as the court below held, petitioners traveled in interstate commerce as soon as the ship crossed from New Jersey to New York waters. When the dice game continued after this travel the "thereafter" provision of the statute was satisfied.

Moreover, the payment to the ship employee who arranged the tables and the distribution of money among petitioners was made after the ship docked. Thus, after the interstate travel, petitioners distrib-

uted the proceeds and performed acts to promote, manage, establish and carry on their unlawful gambling activity, as required by the part of the statute under which they were indicted.

2. Petitioners also argue that the dice games did not constitute a business enterprise as required by the statute (Pet. 13–14). The trial court, however, found that the operation of the dice games was a business enterprise conducted on a systematic basis (R. 806). This conclusion is fully supported by the evidence. After his arrest Dello Russo told an agent that, in view of the F.B.I. interest, he was going to have to find "another trade" (R. 504). Brennan asked that he be permitted to walk from the ship in such a way that "the suckers" could not see his face (505). Fusco had on his person a card from a concern selling dice equipment (R. 534). Such statements and the other evidence make clear that a business partnership intent on winning had been operating on the ship.

Petitioners' argument that their activity did not violate New York law (Pet. 14–16) falls with its premise that no commercial aspect was shown.

3. It is the province of Congress to determine the extent of permissible punishment for federal offenses. Congress had the right to regard use of interstate travel to further a gambling enterprise as a serious offense and to fix a uniform federal punishment notwithstanding the vagaries of state law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
FRED M. VINSON, JR.,
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BEATRICE ROSENBERG,
EDWARD FENIG,
Attorneys.

JULY 1968.

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